INDEX

The Petition

	PAGE
Opinions Below	2
Jurisdiction	2
Questions Presented	2
Statute Involved	3
Statement of Case	4
Specifications of Error	11
Reasons for Granting the Writ	12
A. Failure to Compel Election and Severance	12
B. The Doctrine of Res Adjudicata	13
C. Failure to Charge on Criminal Intent	15
Conclusion	16

STATUTES CITED

United States Code	
Title 12, Section 1731 (a) (repealed)	3, 4
Title 18, Section 88 (amended)	3
Title 28, Section 1254 (1)	2
Federal Rules of Criminal Procedure	
Rule 14	3

TABLE OF CASES CITED

Dunn v. United States, 284 U. S. 390, 393	14, 15
McElroy v. United States, 164 U. S. 76	12
Morgan v. United States, 98 Fed. (2d) 473, 475 (CA 8)	12
Ross v. United States, 180 Fed. (2d) 160 (CA 6)	2, 4
Sealfon v. United States, 332 U. S. 575	13, 14, 15
Thomas v. United States, 150 Fed. (2d) 85, 93 (CA 9)	15

IN THE

Supreme Court of the United States

October Term, 1952

No. ————

MARTIN ROSS and MILTON GECKER,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE SIXTH CIRCUIT

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

Petitioners Martin Ross and Milton Gecker pray that a writ of certiorari issue to review the order and judgment entered by the Court of Appeals for the Sixth Circuit on May 29, 1952, and the order denying the petition for a rehearing entered on June 26, 1952. Said order and judgment affirmed a judgment whereby petitioners were each convicted and sentenced by the District Court for the Southern District of Ohio, Western Division (Judge H. Church Ford sitting by designation), to serve a sentence of four years and pay a fine of Six Thousand ($6,000.00)

Dollars and costs for alleged violation of the provisions of Title 12, Section 1731 (a), U. S. Code (since repealed)—the separate petition for re-hearing of Irving Ross, a co-defendant, is still pending in the Court of Appeals.

OPINION BELOW

The opinion of the Court of Appeals for the Sixth Circuit is not as yet reported. It is set forth in the record. No opinion of the District Court for the Southern District of Ohio is reported or filed. A decision in a previous trial where convictions were reversed is reported as *Ross* v. *United States,* 180 Fed. (2d) 160 (CA 6).

JURISDICTION

The judgment of the Court of Appeals was entered on May 29, 1952, and petition for re-hearing denied on June 26, 1952, at which time the execution of the mandate was stayed pending filing of this petition. The jurisdiction of this court is invoked under the provisions of Title 28, U. S. Code, Section 1254 (1).

QUESTIONS PRESENTED

The questions presented by this petition are:

1) Were these petitioners entitled to a severance or separate trials when the record clearly shows they were prejudiced by being forced to stand trial with Irving Ross on counts on which they had been acquitted?

2) When the trial court in a criminal case presents six separate verdicts, and on the verdict on the first count the defendants as acquitted on a conspiracy count, can there be a valid conviction on substantive counts containing the same charges as were set forth in the overt acts in the conspiracy counts, on which they were acquitted?

STATUTE INVOLVED

The petitioners were convicted for alleged violations of the provisions of Title 12, U. S. Code, Section 1731 (a), which reads as follows:

> "1731. PENALTIES.—(a) Whoever, for the purpose of obtaining any loan or advance of credit from any person, partnership, association, or corporation with the intent that such loan or advance of credit shall be offered to or accepted by the Federal Housing Administration for insurance, or for the purpose of obtaining any extension or renewal of any loan, advance of credit, or mortgage insured by the said Administration, or the acceptance, release, or substitution of any security on such a loan, advance of credit, or for the purpose of influencing in any way the action of the said Administration, under this Act, makes, passes, utters, or publishes, or causes to be made, passed, uttered, or published any statement, knowing the same to be false, or alters, forges, or counterfeits, or causes or procures to be altered, forged, or counterfeited, any instrument, paper or document, or utters, publishes, or passes as true, or causes to be uttered, published, or passes as true, any instrument, paper, or document, knowing it to have been altered, forged, or counterfeited, or willfully overvalues any security, asset, or income, shall be punished by a fine of not more than $3,000.00 or by imprisonment for not more than two years, or both."

The petitioners were also indicted for conspiracy to violate the above statute under Title 18, U. S. Code, former Sec. 88, but were acquitted at the second trial of said conspiracy charge.

Rule 14 of the Federal Rules of Criminal Procedure, which reads as follows, is likewise involved:

> "RULE 14. RELIEF FROM PREJUDICIAL JOINDER. If it appears that a defendant or the government is prejudiced by a joinder of offenses or of

defendants in an indictment or information or by such joinder for trial together, the court may order an election or separate trials of counts, grant a severance of defendants or provide whatever other relief justice requires."

STATEMENT OF CASE

The petitioners were originally indicted in an eleven count indictment, the first charge being for conspiracy to violate the provisions of Title 12, Section 1731 (a), U. S. Code, and the other ten counts being for substantive offences alleging violations of that section.

At the first trial all three defendants were convicted of the conspiracy count. Martin Ross was found guilty of Counts 2, 4 and 11; Milton Gecker guilty on Counts 2, 4, 6 and 11, and Irving Ross guilty on Counts 2, 4, 5, 6 and 11. The convictions were reversed by the Court of Appeals and remanded for a new trial. See *Ross* v. *United States*, 180 Fed. (2d) 160.

Upon the cause being remanded, these petitioners, Martin Ross and Milton Gecker, filed motions for a severance and for separate trials on the ground that there were six charges pending against Irving Ross, while there were only four pending against Martin Ross and five against Milton Gecker. The court denied the motion to elect or sever, and the petitioners, Martin Ross and Milton Gecker, were compelled to go to trial joined with Irving Ross. As we shall show, this was highly prejudicial, because not only had they been acquitted on charges (Counts 5 and 6) on which Irving Ross was charged, but Irving Ross did not take the witness stand. The record clearly shows that the jury was confused, and that the joint trial was highly prejudicial to Martin Ross (R. 549-550).

At the second trial all three defendants were again tried jointly. Briefly, the evidence of the Government was to the

effect that the defendants, operating as The Portsmouth Construction Company, were in the business of re-siding homes in Portsmouth, Ohio; that in order to obtain contracts for siding, the home owners were to make applications for loans from the Federal Housing Administration. These loans were all made through the Universal C. I. T. Corporation, a lending agency, who in turn transferred them to the Federal Housing Administration, which insured them. Before making a loan a home owner had to fill out on a form, an F. H. A. credit application. The charge in all instances was that the petitioners falsified the information on these forms—that is, that the home owner gave them information, but that the petitioners falsified the information by putting down incorrect information in many material places. The defendants denied the matter categorically, and defended further on the ground that, since Mr. Haberbush, the manager of Universal C. I. T. Corporation, made a separate credit check on each application, they had no purpose in falsifying any record, and that no reliance was placed on the content of the F. H. A. credit application because of the separate credit check. The jury, after four and a half hours deliberation, acquitted all three defendants on the first count, the conspiracy count, but found Martin Ross guilty on Counts 2, 4 and 11, and Milton Gecker guilty on Counts 2, 4, 6 and 11. After motions for new trial were argued, each of the petitioners was sentenced to serve four years and pay a fine of Six Thousand ($6,000.00) Dollars.

Neither of the petitioners had any previous criminal record.

During the course of the trial evidence was presented on Count 5 which involved James D. Gray. Both Martin Ross and Milton Gecker had been acquitted on this charge at the first trial. The record shows the following took place (R. 251-252):

"Mr. Gorman: Your Honor, we haven't made an objection on this, but at this time I would like to ask the Court to instruct the jury that as to any transactions of James Gray they cannot be received on a substantive count against Martin Ross or Milton Gecker, and as to any transactions on the Delabar matter they cannot be received in evidence on the substantive counts as to Martin Ross.

"The Court: Those gentlemen are not being tried on those counts, and I see no occasion for me to confuse the jury about instructions on counts on which they are not being tried.

"Mr. Gorman: I think we are entitled on behalf of the defendants Martin Ross and Milton Gecker to have an instruction that this evidence is received for a limited purpose only, and that as to the Delabar transaction it cannot be received on the substantive counts against Martin Ross, and as to the Gray transactions it cannot be received on the substantive counts——

"The Court: I will take care of the proper application of the testimony to the proper counts when we complete the hearing of the case and are able to determine what the testimony is bearing upon such count.

"I will not give part instructions because I haven't heard all of the evidence, and the Government is not compelled to prove all of their case by one witness or by two.

"Mr. Gorman: Under our procedure, of course, it is customary for the instructions to be given——

"The Court: Your motion is noted and will be overruled at this time."

It is true that in the general charge the court did attempt to limit the evidence, but the attempt was ineffective, and did not prevent prejudice. In this count it was admitted that Martin J. Ross filled out the credit application, and it was conceded that the handwriting was his. Despite the fact that he had previously been acquitted on this charge, the jury apparently wanted to find him guilty on this count.

After the jury had deliberated for two and three quarters hours, the following occurred (R. 546-550):

"PROCEEDINGS

(After the jury had been out for a time in deliberation they returned at 3:45 o'clock, p.m., and the following proceedings were held in open court:)

"The Court: Now, ladies and gentlemen of the jury, the information has been brought to me that you wish to ask the Court some questions or some further instructions or something that you want to communicate to me.

"Mr. Forman: ——Will the foreman stand?

"The Jury Foreman: Yes, your Honor.

"The Court: You may present whatever the jury wishes.

"The Jury Foreman: Judge, your Honor, we're a little in the dark concerning count five, concerning James Gray and Ella Gray, in that count five is against —We have here signed M. J. Ross and M. J. Ross on the F. H. A. Title 1 Credit Application and also the proposal, Portsmouth Construction Company. We have the contract for M. J. Ross and signed by M. J. Ross on both of these papers.

"Now, the count is against Irving Ross, and we're in the dark concerning that, Judge, your Honor.

"The Court: Well, I'm sorry. Gentlemen, do either of you want to come up here?

(Counsel confer with Court at bench out of hearing of jury as follows:)

"The Court: Gentlemen, the gentleman's statement seems to be due to the fact that Irving Ross only is charged in the count, whereas M. J., which would seem to be Martin——

"Mr. Abrams: That's right.

"The Court: ——signed the contract.

"Mr. Abrams: That's right. And Martin, if you remember, testified that he was the fellow who was there.

"The Court: There's nothing that you can do about that except say, 'that you heard the testimony bearing upon whether or not Irving Ross was there.'

"Mr. Gorman: Martin Ross was not there.

"The Court: No; he's not in the case. It was dismissed before for lack of evidence.

"Mr. Gorman: That's right.

"The Court: Which one of the deals does it involve?

"Mr. Richter: James D. Gray.

"The Court: Did Gray say first that it was Irving Ross?

"Mr. Abrams: That's right.

"The Court: Didn't he go down there and identify Irving Ross as the man?

"Mr. Abrams: That's right; but on cross examination, if you remember——

"The Court: He said that he might be mistaken.

"Mr. Abram: He said on the first trial it was two and a half——

"The Court: That's right. That's my recollection of that testimony.

"Mr. Richter: Yes.

"Mr. Abrams: And Martin said that he signed it; and it was his handwriting, and M. J. is Martin.

"The Court: If you gentlemen think it will help them to resolve their difficulty, I will just refresh their recollection as to what that testimony was.

"Mr. Richter: I think that's in order.

"Mr. Abrams: How about the handwriting expert's showing——

"The Court: That it is the handwriting; is that correct?

"Mr. Richter: That's correct, except that we would like the identification of Mr. Gray to be called to their attention.

"Mr. Abrams: And the cross examination.

Mr. Gorman: Martin Ross' testimony in the previous trial.

"The Court: That's right. Well, you carefully observe what I say, and if there is anything about it that isn't in according with this understanding——

(The following proceedings took place in the hearing of the jury:)

"The Court: Ladies and gentlemen, both sides have recognized the fact that you have been presented with a situation under the evidence here that they would like to straighten out. It's a situation that we can't change, of course; but they have agreed that I might refresh your recollection in regard to it.

"This is count five, is it?

"The Jury Foreman: Yes, sir; count five.

"The Court: Under count five, as you have already indicated you understand, only Irving Ross is now on trial. At a previous trial of this case Martin Ross was dismissed on that count for lack of evidence at that time; so we can't retry Martin Ross on that count. Irving Ross is the only party charged.

"Now you are confronted with an exhibit, however, which bears the signature of M. J. Ross, which would appear to be Martin Ross, and which Martin Ross testifies that he signed. My recollection is that Martin Ross testified that he participated in that transaction and not Irving Ross.

"Mr. Abrams: That's right.

"The Court: On the other hand, Mr. Gray testified that it was Irving Ross, and he came down off of the stand and put his hand—or pointed his finger at Irving Ross.

"The United States Attorney conceded, however, that it was the signature of M. J. Ross when a witness was brought here to identify that signature. You will recall a handwriting expert was presented and started to testify, and Mr. O'Donnell said, 'Well, it's not necessary. I will concede that it is his signature.'

So with that before you, ladies and gentlemen, I can only say that you have to determine what the truth is. I can't.

"Gentlemen, anything further?

"Mr. Abrams: Yes, I believe it ought to be said, too, that on cross examination——

"The Court: You better come up here. I believe it was agreed that I would further remind you that on cross examination Mr. Gray said that it was possible that he was mistaken. It is my recollection of his statement.

"Now you may retire.

"The Jury Foreman: Judge, your Honor, in behalf of the jury, we wish to thank you.

"The Court: Well, I hope we have helped you some.

"Now, ladies and gentlemen, just a moment. Our usual adjourning hour is 4:30. You have been working now since about 1:00 o'clock, a little after. I expect you are getting pretty tired.

"If, when you reach the adjourning hour of 4:30 you have not reached the point where you are ready to report a verdict, and previous to recess at that time and coming back in the morning, why, you can report at that time and I will let you recess and take a rest.

"I think when you have worked a long afternoon, been tense for a long while in argument and discussions, that it sometimes is hardly fair to ask a jury, when they have been subject to that sort of situation, to continue so long that they will be completely exhausted.

"Now, I am going to leave it to you. Whenever you want to recess, at 4:30 or, if you want to continue later, it's up to you. I will be here to await your report one way or the other."

This clearly shows that Martin Ross was prejudiced. While Rule 14 of the Federal Rules of Criminal Procedure seems to govern prejudicial joinder, nevertheless it must be remembered in this case both Martin Ross and Milton Gecker had actually been acquitted on Count 5, a significant fact not present in any previous case.

The court likewise presented six separate verdicts, which the foreman signed six separate times (R. 19-20). It was

presented to the jury just as if there were six separate trials. In charging the jury, the court also specifically said (R. 526):

> "When you sit down to study that first count, and I hope you will take up each count separately, because they are separate offenses, you will consider, of course, the evidence bearing upon the existence of a conspiracy between these three men."

This the jury did, and the first verdict returned as to all three defendants was not guilty on the first count, or conspiracy count. Then the jury proceeded to find all three defendants guilty on Counts 2 and 11, and these petitioners both guilty on Count 4. Motions for acquittal and for new trial were eventually overruled, although the trial court, being in doubt, did remark:

> "But there is a novelty, an interesting problem presented here that I think the higher courts ought to decide" (R. 596).

The Court of Appeals rejected the contentions of petitioners, and relief is sought from this court.

SPECIFICATIONS OF ERROR

The Court of Appeals erred:

1. In denying the motion of petitioners to elect and to sever, which resulted in prejudice to these defendants.
2. In failing to hold that the acquittal on Count One, the conspiracy count, made our findings on the other counts res adjudicata.
3. In refusing to instruct the jury on criminal intent.
4. In affirming the judgment of the District Court.

REASONS FOR GRANTING THE WRIT

A. Failure to Compel Election and Severance.

By compelling the petitioners, Martin Ross and Milton Gecker, to be tried jointly with Irving Ross, who was charged in two counts on which they had been previously acquitted and on which he had previously been convicted, petitioners were denied a fair trial.

There was a conspiracy count pending, and when evidence was presented on Count Five—the James D. Gray count—they were compelled to rebut it, particularly since Irving Ross did not take the witness stand. The jury could well have thought that there was insufficient evidence on Count Two—the Otto A. Smith count—but because of the fact that Martin Ross admitted signing the Gray application, that by reason of that admission, doubt as to Count Two was removed. At no time did the court adequately charge that Martin Ross had previously been acquitted on Count 5, the Gray count. The jury, at least, felt that they could find Martin Ross guilty on Count 5, and would no doubt have done so, but for the subsequent instructions given (R. 546-550).

The same prejudice was prevalent in Milton Gecker's case as in the case of Martin Ross.

In *McElroy* v. *United States*, 164 U. S. 76, this court reversed a conviction where indictments were improperly consolidated. Since then Rule 14 of the Federal Rules of Criminal Procedure, which is to grant "relief from prejudicial joinder," has been adopted, but it is a mere re-statement of existing law.

The Court of Appeals held that the question of granting "a severance and other similar relief is entirely in the discretion of the court." This can not be the rule when actual prejudice is shown by the denial of the motion.

The Court of Appeals relied on *Morgan* v. *United States*, 98 Fed. (2d) 473, 475, where two brothers were prosecuted

jointly. However, in none of the cases cited had the moving defendant actually been acquitted on the charge on which there was joint trial. It is one thing to consolidate and have multifarious counts when an indictment has been returned, but quite another thing to uphold a joinder when two of the three defendants have been acquitted, and only one is charged with the specific offenses.

Here, after the petitioners, Martin Ross and Milton Gecker, were given a new trial, they promptly moved for an election by the District Attorney and for severance. This was denied, and they were forced to go to trial jointly with Irving Ross, who did not even take the witness stand. Throughout the trial they objected and preserved their exceptions. The record affirmatively shows actual prejudice. This is a novel question, not governed by past decisions or the rules, because in no previous case had the moving parties been acquitted. It is the kind of a matter this court should pass upon because it involves the fundamental question of the right to a fair trial.

B. The Doctrine of Res Adjudicata.

The petitioners claimed that because of the acquittal on Count 1, the conspiracy count, that the conviction on Counts 2, 4, and 6 could not stand. The charges contained in the substantive Counts, 2, 4, and 6, being identical with the facts alleged as overt acts in the conspiracy count, acquittal on the conspiracy count constitutes res adjudicata on counts 2, 4, and 6, and precludes conviction thereon. This is the basis of *Sealfon* v. *United States*, 332, U. S. 575. The Court of Appeals in denying the contention said:

> "In the *Sealfon* case, there was a second trial on a substantive count after a previous acquittal on a conspiracy count. Here, there was one trial on a conspiracy count and several substantive counts embraced in a

single bill of indictment. The *Sealfon* case did not purport to overrule and has not the effect of overruling the opinion in *Dunn* v. *United States*, 284 U. S. 390."

"In the *Dunn* case, it was held that where offenses are separately charged in the counts of a single indictment, though the evidence be the same in support of each, an acquittal of one may not be pleaded as *res judicata* of the other. It was stated that consistency in a verdict is not necessary and that each count of an indictment is regarded as if it were a separate indictment."

It is true this has been the general reasoning of the Courts of Appeal since the *Sealfon* case was decided, but the trial judge even conceded that the facts in this case were different than in any previous case.

The Court of Appeals in effect says that under the *Dunn* case, if there is a single trial the verdict can be inconsistent. Under the *Sealfon* case, however, if there are two trials the doctrine of res adjudicata applied, and prevents an inconsistent verdict.

This case was submitted to the jury in a different manner. *Six separate verdicts,* not just one verdict, were submitted to the jury, and they were told to proceed with the first count, and take them up in order. When they had rendered a verdict of not guilty on the first count, the facts as to the other counts were *res adjudicata.*

Considering the facts presented in this case, the rulings in the *Dunn* case and in the *Sealfon* case can not both be upheld. Justice Holmes made no such false distinction between cases where there was one trial, and where there were two trials. In fact, the *Sealfon* case does overrule much of what was said in the *Dunn* case. On page 393 of the opinion Justice Holmes said:

"If separate indictments had been presented against the defendant for possession and for maintenance of a

> nuisance, and had been separately tried, the same evidence being offered in support of each, an acquittal of one could not be pleaded as res adjudicata of the other. Where the offenses are separately charged in the counts of a single indictment the same rule must hold."

Since the *Sealfon* case that statement is no longer the law. If it were, *Sealfon* would have to be overruled. While possibly inconsistencies in verdicts might be upheld, inconsistencies in court's opinions, such as found in both the *Dunn* and *Sealfon* cases, should not be permitted to stand.

Clarification of the doctrine of res adjudicata in criminal cases is essential. Since, in this case, there were six separate verdicts given to the jury, and the jury did decide each one in order, it is clear that this case is different from any other determined since the *Sealfon* case. For that reason we submit that the doctrine of *res judicata* does apply, and that this, like the *Sealfon* case, is an exception to the rule announced in the *Dunn* case.

C. The Court Failed to Charge on Criminal Intent.

Special Instruction numbered 10 submitted by petitioners employed the exact wording used in *Thomas* v. *United States,* 150 Fed. (2d) 85, 93 (CA 9). It read (R. 498)

> "It is not sufficient to prove that the F. H. A. credit application contained an untruthful statement. The burden of proof is upon the Government to prove beyond a reasonable doubt the knowledge of the falsity and the criminal intent so to influence the Federal Housing Administration's acceptance of the loan. Failure to so prove these essential elements must result in an acquittal of the defendant on the count under consideration by the Jury. 150 Fed. (2d) 85, 93."

The court refused to give this instruction, and thereby removed from consideration of the jury the question of

criminal intent. While the court claimed the matter had been covered in the general charge, we have been unable to find it. The petitioners might have had an intent to obtain a loan for a home owner, but that intent must be criminal, and not just a general intent. One of the prime defenses of petitioners was removed by refusal to grant the above requested instruction.

CONCLUSION

For the reasons stated, the petition for writ of certiorari should be granted, and the decision of the Court of Appeals for the Sixth Circuit, reversed.

Respectfully submitted,

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3

For consent - See No. 271

Supreme Court, U.S.
FILED
AUG 14 1952
CHARLES ELMORE CROPLEY

IN THE

Supreme Court of the United States

OCTOBER TERM, 1952

No. 273

IRVING ROSS, *Petitioner*,

v.

UNITED STATES OF AMERICA, *Respondent*.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT.

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INDEX

	Page
Opinion below	1
Jurisdiction	2
Question presented	2
Statement	2
Specifications of error	6
Reasons for granting the writ	6
Conclusion	9

CITATIONS

CASES:

Dunn v. United States, 284 U.S. 390 ..... 6, 7, 8
Krulewitch v. United States, 336 U. S. 440 9
Sealfon v. United States, 332 U.S. 575 ..... 2, 5, 6, 7, 8

STATUTES:

12 U.S.C. § 1731(a) 2

IN THE

Supreme Court of the United States

OCTOBER TERM, 1952

No. ———

IRVING ROSS, *Petitioner,*

v.

UNITED STATES OF AMERICA, *Respondent.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT.

Petitioner Irving Ross, by his counsel, Joseph B. Keenan and Alvin O. West, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Sixth Circuit entered in the above entitled case on May 29, 1952.

OPINION BELOW.

The United States District Court for the Southern District of Ohio, Western Division, did not issue an opinion. The opinion of the United States Court of Appeals for the Sixth Circuit (R. 680-692)[1] is not yet reported.

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[1] This is a companion case to No. 221 of this Term, *Martin Ross and Milton Gecker* v. *United States of America,* and with the exception of the references to the Supplemental Record filed herewith the record references are to the record in No. 221.

JURISDICTION.

The judgment of the Court of Appeals was entered on May 29, 1952 (R. 679). A petition for rehearing on behalf of Irving Ross, filed June 18, 1952, was denied on July 17, 1952 (Supp. R. 699, 704). The jurisdiction of this Court is invoked under the provisions of 28 U.S.C. § 1254(1).

QUESTION PRESENTED.

In *Sealfon* v. *United States*, 332 U.S. 575, this Court held that where the verdict of acquittal in the trial of an indictment for conspiracy was a determination favorable to the defendant of a fact essential to conviction of the substantive offense, such determination barred a second attempt to prove that fact in a subsequent trial of the same defendant on an indictment charging commission of the substantive offense. The question presented in this case is whether the same rule shall be applied where there is one trial on an indictment containing a conspiracy count and several substantive counts and the acquittal on the conspiracy count was necessarily a determination favorable to defendant of a fact essential to sustain a conviction on the substantive counts.

STATEMENT.

Petitioner Irving Ross, together with his brother, Martin Ross, and with Milton Gecker, who are petitioners in No. 221, this Term, was tried in the United States District Court for the Southern District of Ohio under an indictment in which Count 1 charged a conspiracy to violate 12 U. S. C. § 1731(a) and the remaining counts charged substantive offenses under that statute (R. 1-10). As to the petitioner the case was submitted to the jury on the conspiracy count and three substantive counts, and the jury acquitted him on Count 1, the conspiracy count, and on one of the substantive counts, but convicted him on substantive Counts 2 and 11 (R. 19-20, 552-553). Petitioner's

co-defendants were likewise acquitted on the conspiracy count, but were also found guilty on Counts 2 and 11 and certain other counts (R. 19-20, 552-553).

The indictment arose out of certain transactions in connection with a business conducted by the three defendants at Portsmouth, Ohio. Petitioner Irving Ross was already in business in that city when he was joined by his brother, Martin Ross, and by Milton Gecker (R. 355-356, 414). The three formed a partnership which operated as the Portsmouth Construction Company, with its principal business being the sale and installation of insulated imitation brick siding, which was used to re-side the outer walls of residences (R. 356-357, 415-416).

In the division of the work of the partnership, Martin Ross and Milton Gecker did the selling, and Irving Ross was primarily responsible for the office work (R. 356, 415). The procedure followed was that when a job was sold, the salesman would draw up a proposal which became the contract when accepted by the owner, would obtain the necessary information for the FHA Title I credit application, fill it out and have it signed by the owner, and also obtain the signature of the owner to a blank promissory note, the amount to be filled in later after it was known how large a down payment the owner would make as the balance due would not be determined until that time (R. 362-365, 406-407). Upon completion of each transaction the note was discounted with the local office of Universal CIT Credit Corporation and after various subsequent transfers the loan was eventually insured by FHA (R. 267-268, 270-272, 316-317, 318-320).

The gist of the offense charged in Counts 2 and 11, so far as is here material, was that petitioner and his co-defendants had knowingly made, passed, uttered, and published and caused to be made, passed, uttered, and published FHA Title I credit applications containing false credit information (R. 7-8, 10). Admittedly petitioner was responsible for handling the paper work in connection with

the business (R. 356, 415), so that it was he who passed these credit applications to Universal CIT Credit Corporation (R. 267-269, 270-272).

However, on the question as to whether it was petitioner or his brother Martin who had obtained the credit data and entered it on the applications the testimony of the Government's witnesses was confused (R. 687, 690). As to Count 2, both Government witnesses were in agreement that all the papers involved in the transaction were signed at their home at the same time (R. 133-134, 192) and that only one of the defendants was present on that occasion (R. 131-133, 167-168), but one witness identified Martin Ross as the defendant who took the credit data (although she persisted for a time in calling him "Irving") (R. 130, 131, 134-135) while the other witness said it was Irving, and that neither Martin Ross nor Milton Gecker was present when the credit application was signed (R. 165, 167-168).

Likewise, as to Count 11, both witnesses for the Government pointed out Irving Ross and Milton Gecker as the defendants who were present when the credit information was taken, yet in pointing out Irving Ross both witnesses called him by the name "Martin Ross" (R. 195-196, 198-199, 212, 214-215). Later in the trial the Goverment conceded that the proposal contract, a carbon copy of which had been left with the purchaser by the salesman in each instance (R. 144-145, 147, 176-177, 192; Defendants' Exhibits B and BB; R. 207-209, 222-223, 225; Defendants' Exhibits C and CC) bore the signature of Martin Ross (R. 479).[2]

It was conceded that the credit application in Count 2, Government's Exhibit 5, the document containing the false statements, was signed by petitioner and that his handwriting appeared on some portions of it (R. 587, 687). Martin Ross, who testified that he was the salesman who took the credit information, explained this circumstance

[2] At R. 479 these documents are referred to as "original Defendant's Exhibits * * * R and A", which was the designation given them in a former trial of the defendants under this same indictment.

by saying that Irving had signed the application after he (Martin) had forgotten to do so and had turned it in at the office without a signature (R. 431-432, 465). Martin also testified that it was he who filled in the credit data on Government's Exhibits 5 and 8 (R. 429, 455, 467-468; cf. R. 419-420), these being the entries containing the false statements covered by Counts 2 and 11 of the indictment (R. 7-8, 10). Petitioner's handwriting does appear on certain portions of the credit application in Count 11 (R. 691), but not in any of the portions involving misrepresentations.

The foregoing being all the evidence relating to the false statements covered by Counts 2 and 11 of the indictment, petitioner contended on appeal to the court below that there was no substantial evidence that he knew of the falsity of these representations, on the ground that the uncontroverted physical facts (the admitted signature of Martin Ross on the proposal contracts, which were made out at the same time as the credit applications and copies of which had been left with the purchasers) established conclusively that Martin had taken the credit data and entered it on the credit applications, and there was no evidence that Martin's knowledge of what had been said and done was ever communicated to petitioner. The further contention was made that on this state of the record, there having been no charge on aiding and abetting, petitioner's conviction could be sustained only on the theory that he had entered into an agreement with his co-defendants to commit the substantive offenses charged in the indictment, and since the existence of an agreement had been negated by the acquittal of all three defendants on the conspiracy count the conviction should be set aside under the doctrine of *Sealfon* v. *United States*, 332 U.S. 575.

The court below rejected the latter contention, saying (R. 682):

> In the *Sealfon* case, there was a second trial on a substantive count after a previous acquittal on a con-

spiracy count. Here, there was one trial on a conspiracy count and several substantive counts embraced in a single bill of indictment. The *Sealfon* case did not purport to overrule and has not had the effect of overruling the opinion of Mr. Justice Holmes in *Dunn* v. *United States*, 284 U.S. 390.

The court below also rejected petitioner's contention as to the insufficiency of the evidence, finding that petitioner was "involved in the fraudulent transaction" (R. 687; see also R. 690) and holding that "[i]nasmuch as Irving Ross had charge of the documents on which his handwriting appears, there was justification for finding that he had guilty knowledge of the crooked transactions charged in the Eleventh Count" (R. 691). The judgment of the district court was affirmed, and a petition for rehearing on behalf of Irving Ross, timely filed, was denied on July 17, 1952 (R. 679; Supp. R. 699, 704).

SPECIFICATIONS OF ERROR.

The court below erred:

1. In refusing to hold that, since in the circumstances of this case it was necessary to find an agreement between petitioner and his co-defendant in order to convict petitioner of a substantive offense, the acquittal of petitioner on the conspiracy count barred a conviction on the substantive counts.

2. In affirming the judgment of the district court.

REASONS FOR GRANTING THE WRIT.

The basic reason given by the court below for holding the doctrine of *Sealfon* v. *United States*, 332 U.S. 575, inapplicable here was that in *Sealfon* there was a second trial on a substantive count after a previous acquittal on a conspiracy count, while in the present case there was a single trial on a single indictment containing a conspiracy

count and several substantive counts (R. 682). No effort was made, however, to explain the logic of a ruling that a jury verdict which is improper in the light of a verdict rendered by a different jury becomes proper if both verdicts are rendered by the same jury.

The justification for the distinction was found by the court below in *Dunn* v. *United States*, 284 U.S. 390, the court below holding that *Sealfon* did not have the effect of overruling the decision in the *Dunn* case that a jury may properly return inconsistent verdicts in the same case (R. 682).

Petitioner contends that the court below has misconceived the significance of the *Sealfon* decision and that this Court should specifically re-examine its holding in the *Dunn* case and recognize that it is inconsistent with the intelligent administration of justice.

The rationale of the *Dunn* decision is to be found in these two sentences from the opinion in that case (284 U.S. at 393):

> • • • If separate indictments had been presented against the defendant for possession and for maintenance of a nuisance, and had been separately tried, the same evidence being offered in support of each, an acquittal on one could not be pleaded as *res judicata* of the other. Where the offenses are separately charged in the counts of a single indictment the same rule must hold. • • •

In other words, this Court held in *Dunn* that consistency in a verdict is not necessary (or, as it might be otherwise stated, that *res judicata* does not apply as between the verdicts on separate counts of a single indictment) because an acquittal on one indictment could not be pleaded as *res judicata* at a subsequent trial of a separate indictment for a related offense, the same evidence being offered in support of each indictment. But in the *Sealfon* case this Court held that a verdict of acquittal in the trial of a conspiracy indictment which was a determination of a fact

essential to conviction of the substantive offense could be pleaded as *res judicata* of an indictment for the substantive offense, thus in effect repudiating the major premise on which the *Dunn* decision was based.

In such circumstances we submit that the same considerations which dictated the granting of certiorari in the *Sealfon* case require the granting of the writ here. Now that this Court has repudiated the basic premise of the *Dunn* decision it should certainly proceed to eliminate it as a precedent which would block the logical extension of the *Sealfon* rule to cases where there is one trial on a single indictment containing a conspiracy count along with substantive counts.

This question is of especial importance because the present case is only one of the vast number of cases which reflect the growing trend toward indicting for conspiracy in addition to the substantive offense. That this practice constitutes a serious threat to fairness in our administration of justice is widely recognized. See concurring opinion of Mr. Justice Jackson in *Krulewitch* v. *United States*, 336 U.S. 440, at 445, 452-454. This unfairness is accentuated if the prosecution is permitted to subject a defendant to the many practical difficulties in defending against a charge of conspiracy which he does not face in defending against a charge of a substantive offense, without the defendant being given at least the benefit of the full implications of an acquittal on the conspiracy count (if he is acquitted) in dealing with the substantive counts.

The *Dunn* decision was not rendered without dissent, and we respectfully submit that Mr. Justice Butler expressed the attitude toward inconsistent verdicts which should characterize an enlightened criminal jurisprudence when he said (284 U.S. at 407):

> • • • The inference that the jury, seeking rightly to discharge its duty, made a mistake, is to be preferred over the suggestion that it found for defendant upon an assumption of power it might not lawfully exert.

CONCLUSION.

For the foregoing reasons, the petition for writ of certiorari to the United States Court of Appeals for the Sixth Court should be granted.

Respectfully submitted,

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